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Supreme Court, U.S.
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In The

Supreme Court of the United States

ZULFIQAR EQBAL and SAMEENA IKBAL,

Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the government may prosecute and convict for an alleged false statement under 18 U.S.C. § 1001 when that statement is a legal conclusion which a court has held is open to question.

II.

Whether the government, while engaged in civil litigation with citizens over their legal status, may ignore orders from a court of appeals and a district court to conduct hearings to determine that legal status, and instead, unilaterally, indict those individuals alleging their legal conclusions are false statements.

LIST OF PARTIES

The parties to the proceedings below were the plaintiff, United States of America and the defendants-Petitioners, Zulfiqar Eqbal and Sameena Ikbal. Plaintiff is represented by John Lyons, Assistant United States Attorney for the Northern District of California (San Francisco).

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PRAYER

The Petitioners, Zulfiqar Eqbal and Sameena Ikbal,[1] respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered October 2, 2000.[2]

OPINIONS BELOW

The October 2, 2001, memorandum opinion of the Court of Appeals for the Ninth Circuit denying Petitioners' appeal is unpublished, and is reprinted in the appendix hereto. (App. 1-8.) The Ninth Circuit's opinion in a related civil matter is published at 147 F.3d 1148, 1154 (9th Cir. 1998). (App. 24-38.)

I.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a)(1). This petition is filed within 90 days of the denial of the Petition for Rehearing and Rehearing en

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[1] In 1994, Eqbal changed his name, due to a myriad of personal and religious reasons, from Mirza Zulfiqar Ali to Zulfiqar Eqbal. At the same time and for the same reasons, Ikbal changed her name from Sameena Ali to Sameena Ikbal, her maiden name. (RT 7-937-939; 7-1053-1057.) Citations to "RT" refer to the Reporter's Transcript of the proceedings below. Citations to "ER" refer to the Excerpt of Record filed in the Ninth Circuit. Citations to "App." refer to the appendix to this petition for a writ of certiorari.

[2] On November 20, 2001, the Ninth Circuit denied Petitioners request for rehearing and rehearing en banc. *United States v. Eqbal and Ikbal*, CR 00-10165 and 00-10217-CW. (App. 39-40.)

Banc and is timely under the Rules of the Supreme Court of the United States.

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person . . . shall be deprived of life liberty, or property, without due process of law.

18 U.S.C. § 1001 reads:

> (a) Except as otherwise provided in this section, whoever, in any manner within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation; or
>
> (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;
>
> shall be fined under this title or imprisoned not more than 5 years, or both.
>
> (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings, or documents submitted by such party or counsel to a judge or magistrate in that proceeding.
>
> (c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to –

> (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or
>
> (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

Federal Accusation Regulation FAR 9.409(a)(2) defines "principal" as:

> officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment, and *similar positions*). (Emphasis added).

III.

STATEMENT OF THE CASE

A. INTRODUCTION.

While Petitioners were engaged in civil litigation with the government over the legal conclusion of whether Eqbal was a "principal" in a company called Samtech, Petitioners were indicted and convicted under 18 U.S.C. § 1001 for making the allegedly false statements that no principals of Samtech had been debarred.

"Principal" is defined in Federal Accusation Regulation FAR 9.409(a)(2), as noted *supra*, as:

> officers; directors; owners; partners; and, persons having primary management or supervisory responsibilities within a business entity (*e.g.*, general manager; plant manager; head of a subsidiary, division, or business segment, and *similar positions*). (Emphasis added).[3]

In *Sameena, Inc. v. United States Air Force*, 147 F.3d at 1154 (App. 37) the Ninth Circuit held that Eqbal's status as a principal of Samtech was a question of fact. Within weeks of that decision, and before the civil litigation was resolved in Petitioners' favor, the government indicted Eqbal and claimed that Petitioners' statements that no principals of Samtech had been debarred were false statements under 18 U.S.C. § 1001. This Court should grant certiorari in this case to forbid § 1001 prosecutions for statements based upon legal conclusions from uncertain facts, and limit § 1001 prosecutions to instances where defendants make statements of fact that are objectively known to be false at the time the statements are made. The rule we propose is the rule in the majority of Circuits.

B. PROCEDURAL BACKGROUND.

Zulfiqar Eqbal and his wife, Sameena Ikbal, operated a computer products company called University Systems, Inc. ("USI"). (RT 7-957:6-22.) In 1992, Eqbal, Ikbal and USI became embroiled in a controversy with the Social Security Administration ("SSA") regarding false claims of the

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[3] During jury instructions, Appellants objected to this definition on due process grounds and asked that the "similar positions" language be stricken. (RT 6-877:1-7; ER 157-158.)

origin of a computer mouse (RT 2-59:13-25). *See Sameena, Inc. v. United States Air Force*, 147 F.3d at 1150 (App. 25.) Although there were no findings that Eqbal knew of the false representations regarding the origin of the mouse, the SSA Deputy Commissioner for Finance, Assessment and Management recommended that Eqbal and USI be debarred. A proposed debarment has the same practical effect as an actual debarment, and immediately prohibited Eqbal from soliciting, receiving or otherwise participating in any federal contracts or subcontracts. (RT 2-64:19-25; *see* FAR 9.405(a)-(c).)

Following the debarments, University Systems was forced into bankruptcy. (RT 7-1008:14-22.) One of the most valuable assets of University Systems was a contract with the Department of Energy ("DOE"). The government knew that Eqbal and Ikbal were husband and wife, knew both had worked at USI, knew USI and Eqbal had been debarred, but still agreed to the novation of the maintenance contract from the debarred USI and Eqbal to the still qualified Ikbal and Samtech. (ER 192.) This novation could not have occurred unless the government believed Eqbal was not a principal at Samtech. (RT 7-1010:11-7-1011:20; ER 192.)

On July 31, 1995, Samtech submitted a bid to the government to provide laptop computers. (RT 3-209:3-24.) That bid contained a certification that no debarred person was a principal of Samtech. (RT 3-210:21-3-211:5; ER 92.) The government disqualified Samtech from the bidding process contending that certification was false because Samtech employed Zulfiqar Eqbal, a debarred individual, in a principal position within the company. (*See, e.g.*, ER 199.) Based upon this allegedly false certification, the

government proposed both Ikbal and Eqbal (again) for debarment. (RT 3-290:25-291:8; *see* ER 143.)

Petitioners then sued the government, openly and notoriously claiming that Eqbal was not a principal of Samtech, and sought to overturn their debarments alleging, among other things, that the government violated their due process rights in failing to provide them with an opportunity to present and cross-examine witnesses in the debarment proceedings. *Sameena, Inc. v. United States Air Force,* 147 F.3d at 1151. (App. 28-29.) The government responded by filing a motion for summary judgment, which the district court erroneously granted. *Id.*

Appellants appealed and won. The Ninth Circuit found that because the evidence was in conflict and the government had refused to grant a debarment hearing, Eqbal's original debarment and Petitioners' later debarments were improper. *Sameena, Inc. v. United States Air Force,* 147 F.3d at 1153-1154 (App. 37-38); *Ali v. Dept. of Health and Human Services, et al.,* No. 97-15264.

While the appeals were pending, Eqbal and Ikbal learned that the government had begun a criminal investigation and they retained Joseph Russoniello, the Former United States Attorney for the Northern District of California, to represent them. (ER 25.) According to Mr. Russoniello, the government offered to enter into a plea agreement calling for probation for both Eqbal and Ikbal on the condition that Eqbal, Ikbal, and the entities drop their civil litigation against the government. (ER 12-14; 26-29.)[4] Eqbal and Ikbal refused to enter into the

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[4] The government filed a counter affidavit claiming that the defense had brought up the subject of a global resolution of the charges. (ER 18.) The district court, however, declined to resolve

proposed agreement. They won their appeals. (ER 97; 102; App. 24-38.) The Ninth Circuit decided that Eqbal's alleged principal status was a question of fact and remanded the case for a hearing and determination of Eqbal's status. (App. 37.)

The government refused to participate in the hearings ordered by the Ninth Circuit, and by the district court on remand, to determine whether Eqbal was a principal.[5] Instead, the government unilaterally indicted Eqbal and Ikbal and alleged that Petitioners' legal conclusion that Eqbal was not a principal, which Petitioners had maintained throughout the debarment proceedings, in the district court, and before the Ninth Circuit, (RT 3-294, 315) was a false statement under 18 U.S.C. § 1001.[6] (*See* ER 46-57.)[7]

The fact of this new criminal indictment gave the government the goal it had been unsuccessfully seeking: disqualification of Petitioners from government contracting. *See* FAR 9.405. At trial there was no evidence that Eqbal held one of the positions identified as a "principal" in the FAR, and the government's case was not based

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this factual dispute stating: "I suppose it would be somewhat entertaining to have an evidentiary hearing in which Mr. Russoniello and Mr. Burch swore that each other was lying about their conversations, but not interesting enough to make me want to do it." (ER 23.)

[5] As a result of the government's refusal to hold the ordered hearings, the district court dismissed the debarments with prejudice. (ER 141.)

[6] This indictment was a new and independent ground for debarment.

[7] Eqbal was first indicted on a charge of false statements to a bank. That case, reversed on appeal, was combined with this case, against both Petitioners, for trial.

upon a contention that Eqbal held one of the identified positions.

Samuel Hilker, the Air Force Acting Deputy General Counsel For Contractor Responsibility, had signed the memorandum in support of Eqbal's debarment. (RT 292.) As indicated above, that debarment was based upon a claim that Samtech had made a false statement that no principals had been debarred. (RT 3-335.)

Hilker testified that his duties included interpreting the FAR to determine whether a person was a "principal" in a business. (RT 3-276, 3-349.) Hilker, however, was unable to articulate a consistent definition of the term "principal":

> Q: And a sales manager – would a sales manager be a principal?
>
> A: Could be.
>
> Q: Would a manager be a principal?
>
> A: Could be.
>
> Q: But a manager may not be a principal?
>
> A: Possibly not.
>
> (RT 3-302.)
>
> Q: Everyone who conducts business on behalf of a company is not a principal?
>
> A: Possibly not.
>
> (RT 3-304.)

Hilker contended that principal was defined, not by the terms of the FAR, but by his official, private discretion:

> Q: Now when Mr. Lyons asked you what makes a principal, I want to make sure I got your response correct. Did you say "it makes someone a principal in my mind?" Were those your words?
>
> (RT 3-348.)

A: I don't have a current and specific recollection of – of stating it that way.

Q: Because whether someone is a principal or not is actually determined under the definition in the Federal Acquisition Regulations, not in the definition in your mind, correct?

A: It's part of my discretionary authority to make that determination, so my mind is very important.

(RT 3-349.)

Q: Are you free to broaden [the FAR]?

A: That determination is going to – is going to rest on a number of matters, you know. I can't expand what the regulation states, but I can construe it, and I can exercise my discretion under it.

(RT 3-349.)

In its closing argument, the government conceded that Eqbal did not hold one of the identified positions and argued to the jury that Eqbal exercised authority: "in a way that is similar to – and held a position similar to those examples given in the definition;" (RT 8-1292; App. 43) and that while Eqbal's role was important, his wife, Ikbal "was the one that was really in charge." (RT 8-1206; App. 43.)

The jury was instructed in accordance with the "similar position" language. (RT 8-1186; App. 42.)

Accordingly, as the jury was instructed, and under the arguments made, Petitioners could be, and were, convicted for their legal conclusion that Eqbal was not a principal of Samtech, even though he did not hold any of the positions identified as a principal in the FAR.

The jury returned a guilty verdict against Zulfiqar Eqbal on one count of conspiracy and three counts of

making false statements to the government.[8] (RT 1326-1329; App. 15-16.) The jury found him not guilty of three other counts of making false statements to a government agency. *Id.* The jury found Sameena Ikbal guilty of one count of conspiracy and five counts of making false statements to a government agency. (RT 1326-1329; App. 9.)

On March 20, 2000, the district court sentenced Sameena Ikbal to 60 months of probation, concurrent, on each count of her conviction. (ER 228-231; App. 10.) On April 24, 2000, Zulfiqar Eqbal was sentenced to 30 months in federal custody to be followed by a term of 48 months on supervised release. (ER 235-240; App. 17.)[9]

On appeal, and in the trial court, Petitioners claimed that the government's theory of prosecution violated due process and was unconstitutionally vague because it used 18 U.S.C. § 1001 to criminalize a legal conclusion that Eqbal was not a principal of Samtech and that there was insufficient evidence Petitioners made any false statements. Petitioners also sought discovery, alleging that the government was using this criminal prosecution to achieve the goals it could not achieve in its civil proceedings.

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[8] Eqbal was also convicted of one count of bank fraud and one count of false statements to a government agency. These convictions were overturned by the Ninth Circuit at 266 F.3d 1242 (9th Cir. 2001).

[9] Because this sentence was primarily based upon the reversed bank fraud conviction, the Ninth Circuit remanded the case for resentencing. (App. 7-8.)

IV.

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION.

This case demonstrates the danger presented when one party, the government, has the option to resort to both civil and criminal litigation to obtain one goal, here the disqualification of Petitioners from government contracting. While the government and Petitioners were civilly litigating whether Eqbal was a principal in Samtech, and immediately after the Ninth Circuit decided that whether Eqbal was a principal was an open question of fact, the government indicted Petitioners, claiming the legal conclusion that the Ninth Circuit had found to be an open question of fact was a false statement in violation of 18 U.S.C. § 1001. In essence, this prosecution and conviction were based upon the assumption that the government's legal conclusion that Eqbal was a principal was infallible, and the Petitioners' legal conclusions to the contrary were false statements. This type of arbitrary law enforcement strikes at the heart of Petitioners' due process rights under the Fifth Amendment.

This indictment also violated Petitioners' rights to fair notice of potential charges against them and these convictions demonstrate the dangers this Court has previously noted which flow when the roles of prosecutor and civil litigant are combined.

The problems presented by dual civil and criminal proceedings in cases like this could be prevented if this Court adopts the rule from the majority of Circuits that a conviction for an alleged false statement charged as a violation of 18 U.S.C. § 1001 may not stand if the charged statement is ambiguous. If Eqbal's status was ambiguous,

statements about that status could not be the predicate for a § 1001 prosecution in the majority of Circuits. The Ninth Circuit ignored that rule in affirming these convictions.

Accordingly, this Court should clarify the law regarding § 1001 prosecutions to clearly state that a prosecution for a false statement under § 1001 may not be satisfied by a statement that under the defendant's interpretation of the facts could be true. As applied by the Ninth Circuit, any statement of legal opinion becomes grounds for a prosecution as a false statement if there is a difference of opinion between the speaker and the government.

This Court should exercise its supervisorial role and remind the Ninth Circuit that the government may not prosecute individuals simply because they take a legal position contrary to the government in civil litigation.

B. PETITIONERS WERE PROSECUTED UNDER AN UNCONSTITUTIONALLY VAGUE THEORY.

Fundamental principles of due process require that no individual be forced to speculate, at the risk of indictment, whether his conduct is prohibited. *Dunn v. United States*, 442 U.S. 100, 112 (1979); *Graynard v. City of Rockford*, 408 U.S. 104, 108 (1972).

The term "principal" as defined under the FAR and applied in this case is unconstitutionally vague because it fails to give a person notice of what is prohibited and grants law enforcement unfettered discretion to determine what acts are forbidden.

The Ninth Circuit rejected this argument by adopting the government's argument that "because the vague regulations do not themselves contain criminal penalties, a vagueness challenge is inapposite." (App. 3.)[10]

This "conclusion" ignores Petitioners' clear and repeated claim that the FAR was unconstitutionally vague *as applied* as a predicate for a § 1001 prosecution because the legal conclusion whether Eqbal was a principal has not yet been decided. More importantly, however, and the reason this court should review this issue, is that the Ninth Circuit opinion makes it a crime to disagree with the government in any forum other than a court.

Under the government's theory of prosecution in this case, if an alien files a claim for asylum and loses, the claim he is entitled to asylum is a prosecutable false statement. Similarly, if a citizen pays his taxes but then contests the assessment and files for refund, if he loses his refund claim, he is guilty of making a false statement. If an individual living near Federal land contests what the government has described as the parcel boundaries, if he is wrong, he is liable for making a false statement. The

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[10] Ironically, as it rejected Petitioners' vagueness challenge, the Ninth Circuit narrowed the "operative definition of the term [principal]" to "persons having primary management or supervisory responsibilities within a business entity." (App. 4.) This narrowed definition of the term principal mirrors Petitioners' rejected request that the jury be instructed as the Panel suggested principal should be defined (RT 6-877; 1-7; ER 157-158) and does not explain how this narrowed "operative definition" comports with jury instructions and argument based upon the "similar positions." Moreover, the government conceded in argument that Eqbal was not the person having primary management or supervisory responsibility at Samtech. (App. 43.)

Ninth Circuit's construction of § 1001 serves to elevate any losing dispute with the government into a criminal offense.

This Court has recognized the potentially broad reach of § 1001, *see, e.g., Hubbard v. United States*, 514 U.S. 695, 709 (1995), and has noted that if § 1001 were to be applied to representations made before the courts, § 1001 "might be interpreted to criminalize conduct that falls well within the bounds of responsible advocacy." *Id.* at 709. In order to avoid that problem, numerous courts of appeals adopted a "judicial exception function" to the broad language of § 1001. *See, e.g., Morgan v. United States*, 309 F.2d 234 (D.C. Cir. 1962); *United States v. Erhardt*, 381 F.2d 173, 175 (6th Cir. 1967); *United States v. Mayer*, 775 F.2d 1387, 1390 (9th Cir. 1985). That judicial exception function was adopted by this Court in *Hubbard v. United States*, 514 U.S. at 709 and recognized by Congress in the 1994 revision of § 1001 itself.

We would submit that all representations of legal conclusions to any agency may be part of a similar advocacy function and should not be a predicate for a false statement prosecution.

In *Brogan v. United States*, 522 U.S. 398 (1998) several members of this Court expressed concern that government agents could use § 1001 to create crimes. Nevertheless, in *Brogan*, this Court recognized the broad reach of § 1001 and declined to depart from the text of the statute to create an "exculpatory no" defense.

In her concurrence, however, Justice Ginsburg recognized that the *Brogan* "opinion does not instruct lower courts automatically to sanction prosecution or conviction under § 1001 in all instances of false denials made to criminal investigators." Justice Ginsburg also noted that

both this Court and the Second Circuit left open the question whether "to violate § 1001, a person must know that it is unlawful to make such a false statement." *Id.* at 416; *United States v. Wiener*, 96 F.3d 35, 40 (2nd Cir. 1996). Justice Ginsburg noted that nothing suggested that "the mere denial of criminal responsibility would be sufficient to prove such [knowledge]." *Brogan v. United States*, 522 U.S. at 416, quoting *United States v. Wiener*, 96 F.3d at 40.

Here, there was not even a denial of criminal liability, there was only an open and notorious statement of a legal conclusion, a conclusion with which the government differed. It is now time to reach the question left open by *Wiener* and *Brogan*. This Court should forbid § 1001 prosecutions for disputes over legal conclusions, unless that statement is made with an intent to deceive.

To avoid the problems referred to in *Weiner* and noted by this Court in *Brogan*, the Fourth, Sixth, Eighth, Tenth, Eleventh and District of Columbia Circuits have held that when an alleged false statement is triggered by ambiguous language in a contract or certification "the government must negate any reasonable interpretation that would make the defendant's statement factually correct." *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978); *United States v. Dale*, 991 F.2d 819 (D.C. Cir. 1993); *United States v. Migliaccio*, 34 F.3d 1517 (10th Cir. 1994); *United States v. Calhoun*, 97 F.3d 518 (11th Cir. 1996). The Fifth Circuit has clearly stated that:

> a prosecution for a false statement under Section 1001 or under the perjury statutes cannot be based on an ambiguous question where the response may be literally and factually correct. . . . An indictment premised on a statement which on its face is not false cannot survive.

United States v. Moses, 94 F.3d 182, 189 (5th Cir. 1996) citing *United States v. Vesaas*, 586 F.2d 101, 104 (8th Cir.

1978); *United States v. Gahagan*, 881 F.2d 1380, 1383 (6th Cir. 1989).

If the Ninth Circuit had followed this rule, Petitioners could not have been convicted, because as the Ninth Circuit previously held, there was an open question whether Eqbal was a principal.

The Second and Ninth Circuits, however, have taken a contrary position, and have held that as long as the issue of falsity is submitted to a jury, a defendant may be prosecuted for ambiguous statements. *United States v. Schafrick*, 871 F.2d 300 (2nd Cir. 1989) (false statement in a bankruptcy matter); but *see United States v. Diogo*, 320 F. 2d 898 (2nd Cir. 1963). While we agree that a jury must be allowed to decide whether an individual statement is false, a court should not even submit that question to the jury if the allegedly false statement is not false on its face.

We are simply asking this Court to rule, in accordance with the majority of Circuits which have addressed this issue, that the government may not prosecute a defendant under § 1001 for a statement which is not facially untrue, unless the government also proves that the statement was designed to mislead.

Although this Court has not addressed the application for § 1001 to ambiguous responses, in analogous cases involving the perjury statute, which this Court has observed "overlaps" § 1001, *e.g.*, *Hubbard v. United States*, 514 U.S. at 714 n.14, this Court has held that perjury prosecutions may not be based upon ambiguous questions and responses. Both perjury and § 1001 prosecutions are similar in that they are prosecutions not for harming another individual, but for offending against the government itself. *United States v. Gaudin*, 515 U.S. 506,

515 (1995) and this Court has previously analyzed the law of perjury in determining the elements of § 1001. *Id.*

In *Bronston v. United States*, 409 U.S. 352 (1973), this Court stated that the federal perjury statute "does not make it a criminal act for a witness to willfully state any material matter that implies any material matter that he does not believe to be true." *Bronston* put the onus on the questioner to clarify any misleading impression left by a witness's response, stating:

> [i]t is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination. *Id.* at 358-359.

Under *Bronston*, a perjury conviction may not be based upon an answer under oath that is nonresponsive and "arguably misleading by negative implication," but literally true. *Id.* at 353. In *Bronston*, the defendant testified that he did not have any Swiss bank accounts; when asked whether he had ever had any such accounts, he answered, "[t]he company had an account there for about six months, in Zurich." *Id.* at 354. These answers were literally true because the defendant did not personally have any Swiss bank accounts at the time of the questioning, although his company did have a Swiss account. *Id.* at 354-355. In the past, however, the defendant also had a personal Swiss account. His perjury prosecution was based on the theory that, in order to mislead the questioner, he answered the second question unresponsively, referring to the company's account rather than his own, implying he had no personal account at the relevant time. *Id.* at 354.

In *United States v. DeZarn*, 157 F.3d 1042 (6th Cir. 1988), the Sixth Circuit noted that the purpose of the *Bronston* rule is to prevent an examiner from resolving ambiguities in the elicited testimony with a perjury prosecution after the fact. The rationale behind *Bronston* should apply with even more force to prosecutions under § 1001, where the questioning and the answers are not supervised by the Court. Under the Ninth Circuit's ruling, any expression of opinion or conclusion, with which the government disagrees, may subject the speaker to prosecution under § 1001. Certainly many such prosecutions would be barred by the First Amendment, but it is questionable public policy to make citizens fearful of voicing their opinions and conclusions to government agents. Petitioners were prosecuted for the same legal conclusion they took openly and notoriously before the Ninth Circuit. If not for the judicial proceedings exception to § 1001, if they had not ultimately prevailed in the debarment proceedings, they, and their counsel, could have been prosecuted for the legal position taken in the Ninth Circuit. This is an unprecedented expansion of the reach of § 1001.

C. THE FAR DEFINITION OF PRINCIPAL, INCLUDING THE TERM "AND SIMILAR POSITIONS" IS TOO INDEFINITE TO SUPPORT A § 1001 PROSECUTION.

Finally, the FAR definition of principal is ambiguous and insufficient to support a § 1001 prosecution. Eqbal's status was open to question and Petitioners' statements that Eqbal was not a principal could not have supported a perjury prosecution. Here, not even the government official charged with determining whether an individual was

a principal could give a cogent explanation of what makes someone a principal. No witness testified that Eqbal had any of the positions specifically defined as a principal under the FAR. He was not an officer, director, owner, partner, and did not have primary management responsibility in Samtech. (*See* RT 7-1007:11-16.) The government was forced to argue that Eqbal's role was "similar" to that of a principal. (RT 8-1292:2-17; App. 43.) Under these circumstances, Petitioners' legal conclusions that Eqbal was not a principal were not facially false.

> [A] prosecution for a false statement under Section 1001 or under the perjury statutes cannot be based on an ambiguous question where the response may be literally and factually correct. . . . An indictment premised on a statement which on its face is not false cannot survive.

United States v. Moses, 94 F.3d at 189 citing *United States v. Vesaas*, 586 F.2d at 104; *United States v. Gahagan*, 881 F.2d at 1383.

In *United States v. Anderson*, 579 F.2d at 459, Leslie Anderson was charged and convicted of making a false statement in reimbursement certifications to receive federal highway funds. Anderson filled out four certifications that (1) CETA had not been billed for the project and (2) "funds have not been received from the State or expended for such services under any other contract agreement or grant." In fact, federal highway funds had been irrevocably committed for services performed under CETA, but the funds had not yet been received by the contractor. *Id.*

The Eighth Circuit reversed, finding that the language in the certification forms was ambiguous. The Court concluded:

> [i]n light of these ambiguities . . . it was incumbent upon the government to introduce proof sufficient to establish the falsity of the statements as well as the defendant's knowing and willful submission of the statements. In carrying out that burden, government must negative [sic] any reasonable interpretation that would make the defendant's statement factually correct. *Id.* at 460.

Similarly, in *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980), the Fourth Circuit held that a defendant did not make a false statement when the government did not prove that the defendant's interpretation of an ambiguous contract clause was unreasonable. In *Race*, the defendant filed for per diem reimbursement expenses under a government contract, even though he had not actually paid his employees per diem expenses. The government conceded that the contract was ambiguous as to whether the contractor could claim the reimbursement. In response, the court held that because the clause was ambiguous, there could be no false statement:

> [w]hen the Government concedes the clause is ambiguous, it necessarily concedes that the defendants' construction of the per diem clause, which is one of the [two competing] constructions, is reasonable. Such a conclusion requires a ruling that the defendants cannot be convicted under § 1001 for a statement or billing which may be said to be accurate within a reasonable construction of the contract. This is so because one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract. *Id.*

Here, Petitioners only certified that Eqbal was not a principal, and as Hilker testified, the definition of principal is subject to interpretation.

Moreover, as in *Race*, the testimony of the government's own witnesses highlights the ambiguity of the FAR. As previously described, Samuel Hilker, the Deputy General Counsel of the Air Force for Contractor Responsibility, essentially testified that he was the discretionary judge as to whether an individual is or is not a principal. (RT 3-349:1-25.)

D. THE CLARIFICATION OF § 1001 PETITIONERS SEEK WILL ALIGN THE NINTH CIRCUIT WITH THE MAJORITY OF OTHER CIRCUITS AND WILL NOT IMPEDE THE GOVERNMENT'S INTEREST IN OBTAINING HONEST INFORMATION.

The majority of Circuits which have addressed this issue have decided a § 1001 prosecution requires a facially false statement. *See* pg. 15 & 16 Introduction. Contractors in the Ninth Circuit should have similar protection.

The Ninth Circuit has declined to follow the other Circuits' construction of § 1001 and allows conviction for statements of legal opinion, as long as those statements of opinion are not made in a judicial forum. This construction of § 1001 puts a dangerous burden on any individual participating in any proceeding or transaction with the government.

Contractors should not be forced to fill out forms at peril of criminal liability if their interpretation of a vague term varies from that of the government.

The construction of § 1001 that we seek will not inhibit the government in its attempts to obtain honest and candid responses from contractors. Section 1001 not only criminalizes false statements to the government, as

charged in this case, it also criminalizes those who cover up material facts. *See United States v. Tobon-Builes*, 706 F.2d 1092 (11th Cir. 1983). In situations such as this, where a person's status is in dispute, an individual should be free to come to a legal conclusion and argue in support of that conclusion, without risk that his legal conclusion could subject him or her to a prosecution under § 1001. Section 1001 wisely specifically excludes from coverage such legal conclusions in judicial proceedings. There is no good reason to be able to prosecute an individual for sincerely held expressions of legal opinion simply because that opinion is presented out of court.

V.

THIS COURT SHOULD FIND IT IS A DUE PROCESS VIOLATION FOR THE GOVERNMENT TO INITIATE A CRIMINAL PROSECUTION BASED UPON A LEGAL CONCLUSION THAT IT HAS FAILED TO CONVINCE A COURT TO ACCEPT.

In *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) this Court observed that a prosecutor's direct pecuniary interest in the outcome of a case that has an impact on the prosecutor's decision whether or not to enforce a particular statute may have constitutional ramifications. In *Young v. United States*, 481 U.S. 787 (1987), this Court set out a bright line rule forbidding counsel for the party benefited by a civil ruling to be specially appointed to prosecute violations of that rule as a contempt of court. This Court specifically noted that:

> if a Justice Department attorney pursued a contempt prosecution for violation of an injunction benefiting any client of that attorney involved in the underlying civil litigation, that attorney would be open to a charge of committing a

> felony under § 208(a). Furthermore, such conduct would violate the ABA ethical provisions, since the attorney could not discharge the obligation of undivided loyalty to both clients where both have a direct interest. *Id.* at 805.

This Court summed up the heart of the problem with the common sense observation that a prosecutor may be tempted to bring a tenuously supported prosecution if such a course promises financial or legal rewards for the client. *Id.* Under the Model Code of Professional Responsibility, "[a] lawyer shall not present or participate in presenting criminal charges solely to obtain an advantage in a civil matter." ABA Code of Prof. Resp. DR7-105(a) (1969); *see* Cal. R. Prof. Resp. 5-110. As the drafting committee to DR-7-105(a) noted, the criminal process exists for the protection of society as a whole, and that process is undermined when it is used as a tool to force settlement of private claims or controversies. Model Code of Prof. Resp. EC 7-21 (1994). The civil process, which is primarily designed for the settlement of disputes, is impaired when the person against whom it is misused is deterred from asserting his or her legal rights. *Id.* Moreover, the need to protect individuals from the whipsaw effect of joint criminal and civil prosecution has been recognized by state legislation. Just as this Court recognized in *Young* that using a criminal prosecution for civil advantage may violate 18 U.S.C. § 208(a), threatening criminal prosecution for advantage in a civil case is a violation of both California Penal Code § 519 and California Rule of Professional Responsibility 5-110.[11] *See also*

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[11] Although the Department of Justice has argued in the past that the California Rules of Professional Responsibility are not applicable to United States Attorneys, Local Rule 11 and the

People v. Superior Court (Greer), 19 Cal.3d 255, 261 (1977) ("Nor should a prosecutor try a defendant with whom he is embroiled in civil litigation.").

In *Newton v. Rumery*, 480 U.S. 386 (1987) this Court recognized that release dismissal agreements "may tempt prosecutors to bring frivolous charges, or to dismiss meritorious charges to protect the interest of other officials," *id.* at 396, and stated that "[a]ctions taken for these reasons properly have been recognized as unethical." *Id.* at 396 n.4. This Court acknowledged that these agreements may infringe upon important interests of the criminal defendant and of society as a whole, but held each case must be examined on its own facts and that release dismissal agreements were not invalid *per se*. *Id.*

In *United States v. Sells Engineering, Inc.*, 463 U.S. 418 (1982), this Court highlighted the problems presented by government lawyers involving themselves in both civil and criminal proceedings and barred government attorneys from obtaining automatic disclosure of grand jury materials for use in civil proceedings. This Court stated that:

> because the Government takes an active part in the activities of the grand jury, disclosure to Government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or

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McDade Act, 28 U.S.C. § 530B, make California professional conduct rules and decisions also applicable to attorneys in federal practice within the state.

> even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper per se. . . . We do not mean to impugn the professional characters of Justice Department lawyers in general;. . . . Our concern is based less on any belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove. *Id.* at 432 (citation omitted).

In *Young v. United States*, 481 U.S. 787 (1987), this Court again recognized that an interested prosecutor cannot proceed against a defendant without threatening the integrity of the judicial system. In *Young*, the Louis Vuitton company obtained an injunction prohibiting the defendants from counterfeiting Louis Vuitton merchandise. *Id.* at 790. Undeterred, the defendant continued to sell counterfeit merchandise. *Id.* at 791. Vuitton's attorney's successfully set up a sting to obtain evidence of violations of the injunction, and convinced a court to issue an Order to Show Cause why the defendants should not be held in contempt for their violations of the injunction. *Id.* at 791-792. Vuitton's attorney's successfully prosecuted the contempt and the defendants were found guilty. *Id.* at 792.

This Court reversed the finding of contempt and held that counsel for the party benefited by an underlying injunction may not prosecute a contempt proceeding based upon that injunction. *Id.* at 804.

In *United States ex rel. S.E.C. v. Carter*, 907 F.2d 484 (5th Cir. 1990), the Fifth Circuit relied upon this Court's decision in *Young v. United States* to conclude that a government attorney who represented a party's interest

in an underlying civil matter might not be able to impartially discharge his or her duty as a prosecutor to make a "dispassionate assessment of the propriety of criminal charges." *Id.* at 486.

As in *S.E.C. v. Carter*, in this case, the competing interest flows from concurrent representation of the civil and criminal interests of the government. Here, the government specifically attempted to use this criminal proceeding as a method to resolve a civil case, which was not going well for the government. After it looked as if the Ninth Circuit was not going to rule favorably, the government began a criminal prosecution, and offered a probationary disposition in return for abandoning the civil litigation. Just as in *S.E.C. v. Carter*, while the government was locked in an on-going civil struggle with Petitioners, the government used its power to pursue criminal charges against Petitioners to attempt to resolve the civil matter. This case is far more troubling than *Young*, where this Court observed that a pending civil action in which the special prosecutor had an interest theoretically could tempt a prosecutor to use the criminal investigation to gather information of use in those suits. Here the very initiation of the criminal proceeding gave the government the result it had been unsuccessfully seeking, the disqualification of Petitioners from government contracting.

We contend, as the Fourth Circuit held in *Granger v. Payton*, 379 F.2d 709 (4th Cir. 1967), that the prosecution by an individual handling litigation against a defendant violates the due process clause. *See also Crowe v. Smith*, 151 F.3d 217 (5th Cir. 1998) (following *Young*, the Fifth Circuit found due process rights were violated where the contempt prosecutor also represented a party).

Here, the government in general and the San Francisco United States Attorney's Office in particular had been attempting to bar Petitioners from contracting since 1992. In that attempt, however, the government did not follow its own procedures and failed to give Petitioners a hearing where they could make their case. Petitioners fought back and eventually the Ninth Circuit ordered the government to hold a hearing on Eqbal's status as a principal. Instead of holding the ordered hearing, however, the government unilaterally indicted Eqbal and Ikbal and alleged that Petitioners' legal conclusion that Eqbal was not a principal, which they had maintained throughout the debarment proceedings in the district court, and before the Ninth Circuit (RT 3-294, 315), was a false statement under 18 U.S.C. § 1001. That indictment had the same practical effect as an actual debarment, and immediately prohibited Petitioners from soliciting, receiving or otherwise participating in any federal contracts or subcontracts (RT 2-64:19-25; *see* FAR 9.405(a)-(c)).

This is far more than a prima facie showing of improper interest on the part of the San Francisco United States Attorney's Office. The proposed plea agreement required Appellants to dismiss their civil suits against the government. The plea agreement was proposed in June of 1998, at a time when Petitioners' appeals were still pending, and if Petitioners had accepted the plea, the need for a debarment hearing would have been avoided. For whatever reason, as the government's later conduct shows, the government wanted to avoid that hearing.

The government's hopes to resolve the civil cases through the plea agreement were dashed when Eqbal and Ikbal decided to follow through with their appeals and continue with their civil actions. Eqbal and Ikbal finally

won their appeal on July 3, 1998; the next month, on August 27, 1998, Eqbal was indicted. These facts present a prima facie showing that the government brought this case with an improper motive.

Facts far less egregious than those shown here have been seen as evidence of potential violations of due process and indicative of vindictive prosecution.

In *United States v. Hooten*, 662 F.2d 628, 634 (9th Cir. 1981), the defendant argued that the prosecution indicted him because he exercised his rights to file civil actions against an ATF Agent and various government agencies. Although the court rejected the defendant's claim in *Hooten* because the Agent did not have the prosectorial authority to decide whether to file charges, the court stated that the government's choice to file a case may support a charge of vindictive prosecution. *Id.*

In *United States v. Alvarado-Sandoval*, 557 F.2d 645 (9th Cir. 1977), the Ninth Circuit found that the defendant's due process rights were violated where there was evidence of vindictive prosecution. In *Alvarado-Sandoval*, the defendant entered into plea negotiations with the government. The defendant rejected the government's offer to plead guilty to a misdemeanor, and later raised the possibility of filing suppression motions. The government then proceeded to charge the defendant with a felony, rather than a misdemeanor. The defendant filed a motion to dismiss the indictment based upon vindictive prosecution. He was eventually convicted of the felony, and then appealed. In reversing the conviction, the court emphasized that the "[a]ppearance of vindictiveness, not vindictiveness in fact, is the touchstone." *Id.* at 646. The appearance of vindictiveness was apparent because:

> [i]t was only after the appellant, through his counsel, indicated that no plea would be entered and only after the understanding of possible motions was referred to by the magistrate, that the assistant United States Attorney indicated that a felony indictment would be considered. *Id.*

Here, there was a clear appearance of vindictiveness and use of the criminal process to resolve the civil suits on the part of the United States Attorney's Office. This appearance is shown not only through the timing of the prosecution, but also through the declaration of the former United States Attorney for the Northern District of California. He stated the government offered Petitioners probationary sentences if they would dismiss all litigation against the government. This showing was specific, detailed, and substantial. It was certainly "some evidence" (*see United States v. Armstrong*, 517 U.S. 456 (1996) (setting out standard for requiring discovery in selective prosecution case)) of a due process violation and should have led to a more detailed inquiry.

This Court has clearly indicated that an interested prosecutor may violate a defendant's right to due process, and that each case must be examined on its own facts. This Court has not stated, however, what a defendant must show to require a hearing on prosectorial motives. If "[a]ppearance of vindictiveness, not vindictiveness in fact, is the touchstone," district courts need guidance to determine what to do when that appearance of vindictiveness is shown. It is time for this Court to remind the lower courts that even if the hearts of prosecutors may be pure, the appearance of justice is important to all participants in the justice system. When, as here, the timing of a prosecution, coupled with hard evidence from

a reputable source indicates the line separating criminal and civil prosecutions may have been breached, the district court must at least conduct an inquiry to assure that the appearance of justice is not infringed.

Accordingly, we ask this Court to provide guidance to lower courts to assist them in deciding what to do when defendants have demonstrated an appearance of a conflict by the prosecution.

VI.

CONCLUSION.

This case demonstrates the unfairness which flows from mixing civil and criminal litigation. This Court has the ability to insure that contractors are not punished for legal disagreements in ambiguous circumstances. There is no reason that § 1001 should have a lesser standard of proof than a perjury prosecution; requiring the same standard of proof will ensure that civil disagreements do not ripen into criminal prosecutions. The majority of Circuits have all agreed that a factually ambiguous statement is insufficient to support a § 1001 prosecution. Accordingly, we request this Petition for Certiorari be granted and that this Court direct the Ninth Circuit to fall in line with its sister Circuits and forbid § 1001 prosecutions unless the alleged statement is facially false.

Dated: February 15, 2002

Respectfully submitted,

CHRISTOPHER J. CANNON
Attorney for Zulfiqar Eqbal and Sameena Ikbal

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAMEENA R. ALI, aka Sameena Ikbal, Defendant-Appellant.	No. 00-10165 D.C. No. CR 99-40002 CW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIRZA ALI, aka Zulfiqar Eqbal, aka Henry Stone, Defendant-Appellant.	No. 00-10217 DC No. CR 99-40002 CW MEMORANDUM* (Filed Oct. 2, 2001)

Appeal from the United States District Court
for the Northern District of California
Claudia Wilken, District Judge, Presiding

Argued and Submitted May 14, 2001

San Francisco, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

Before: O'SCANNLAIN, TASHIMA, and THOMAS, Circuit Judges.

Sameena Ali appeals her conviction on one count of conspiracy to make false statements to various government agencies, in violation of 18 U.S.C. §§ 371 and 1001, and on five counts of making false statements to a government agency, in violation of 18 U.S.C. § 1001. Mirza Ali appeals his conviction on one count of conspiracy to make false statements and three counts of making false statements to a government agency. The defendants were tried jointly in district court and their appeals have been consolidated. Because the parties are familiar with the facts of this case, we will not recite them here. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

1. Prosecutorial Misconduct

Appellants contend that the prosecutor purposefully elicited testimony that previously had been excluded as privileged and then referred to the excluded and stricken evidence during closing argument. We review for an abuse of discretion a district court's rulings on objections to alleged prosecutorial misconduct. *United States v. Sarkisian*, 197 F.3d 966, 988 (9th Cir. 1999). Where counsel objected to the acts of alleged prosecutorial misconduct at trial, we review for harmless error. *United States v. Cabrera*, 201 F.3d 1243, 1246 (9th Cir. 2000).

With respect to the prosecutor's questioning of the witness, we find that no misconduct occurred. The prosecutor did nothing to elicit privileged testimony or to prompt the witness's response. *See Sarkisian*, 197 F.3d at

988; *United States v. Christophe*, 833 F.2d 1296, 1301 (9th Cir. 1987). With respect to the prosecutor's comment during closing argument, we believe the "misstatement has earmarks of inadvertent mistake, not misconduct." *United States v. Carillo*, 16 F.3d 1046, 1050 (9th Cir. 1994). Even assuming that there was misconduct, it was harmless. The alleged misconduct consisted of only one brief, passing reference to excluded testimony and the court immediately provided a curative instruction. The remark, "followed by the court's instruction, did not materially affect the fairness of the trial." *United States v. Sayakhorn*, 186 F.3d 928, 946 (9th Cir. 1999).

2. *Vagueness of Federal Acquisition Regulations ("FAR"s)*

Appellants contend that their due process rights were violated because FAR § 9.409(a) and § 52.209-5(a)(2), codified at 48 C.F.R. §§ 9.409(a) and 52.209-5(a)(2), are unconstitutionally vague. Whether a regulation is unconstitutionally vague is a question of law to de novo review. *United States v. Albers*, 226 F.3d 989, 993 (9th Cir. 2000). Here, however, such a vagueness challenge is inappropriate because the regulations in question proscribe no conduct and were not enforced against the defendants; rather, the defendants were charged under 18 U.S.C. § 1001 for false statements made to the government in connection with the certification submitted pursuant to the regulations. As such, a constitutional vagueness challenge to the regulations themselves is inapposite. *See, e.g., Bryson v. United States*, 396 U.S. 64, 67-69 (1969) (rejecting vagueness challenge to underlying statutory provision in the context of a false statement prosecution); *United States v. Harris*, 185 F.3d 999, 1004 (9th Cir. 1999) (rejecting

vagueness challenge by defendant charged with making false statements on ERISA documents "because . . . it was clear what he should do: truthfully fill out the ERISA form according to the instructions").

3. Sufficiency of the Evidence

Appellants contend that there is insufficient evidence to establish beyond a reasonable doubt that they "knowingly and willfully" made false statements in the certification because the term "principal," as defined in the FARs, was ambiguous. The evidence was sufficient if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 319 (1979). The operative definition of the term describes "persons having primary management or supervisory responsibilities within a business entity." 48 C.F.R. § 52.209-5(a)(2). We believe the definition is sufficiently clear for a rational trier of fact to find that the defendants knowingly and willfully made the false statements.

4. Exclusion of Notice Evidence

Appellants contend that the district court erred by excluding evidence that Mirza Ali notified the government of his debarred status. Evidentiary rulings made during trial are reviewed for abuse of discretion. *United States v. Hankey,* 203 F.3d 1160, 1166 (9th Cir. 2000). Because the relevant issue was the identity of the

debarred individual, not his debarred status, such evidence was irrelevant and thus its exclusion was not an abuse of discretion.

5. Discovery on Selective/Vindictive Prosecution

Appellants contend that the district court erred in denying their motion for discovery regarding allegations of selective or vindictive prosecution. We review a court's decision on whether to grant discovery related to a selective prosecution claim for abuse of discretion. *United States v. Candia-Veleta*, 104 F.3d 243, 246 (9th Cir. 1996). The standard of review for a claim of vindictive prosecution has not been settled. *See United States v. Gamez-Orduno*, 235 F.3d 453, 462 n.9 (9th Cir. 2000) (recognizing but not deciding the open question as to whether de novo, clear error, or abuse of discretion review is appropriate).

The district court did not abuse its discretion when it denied the motion for discovery with regard to the claim of alleged selective prosecution because there was no showing of "discriminatory effect" or "discriminatory purpose." *Candia-Veleta*, 104 F.3d at 246. With respect to the allegation of vindictive prosecution, "a criminal defendant may be entitled to discovery if he or she establishes a prima facie showing of a likelihood of vindictiveness by some evidence tending to show the essential elements of the defense." *United States v. One 1985 Mercedes*, 917 F.2d 415, 421 (9th Cir. 1990). In order to establish a prima facie case, a defendant "must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." *United States v. Edmonds*, 103

F.3d 822, 826 (9th Cir. 1996) (quoting *United States v. Montoya*, 45 F.3d 1286, 1299 (9th Cir. 1995)) (internal quotation marks omitted).

The only facts alleged to support the vindictive prosecution claim here were that Mirza Ali was offered a plea that included a provision requiring dismissal of the pending civil suits challenging the debarments and that he was indicted shortly after the debarments were reversed on appeal. We have held that "the mere filing of an indictment can support a charge of vindictive prosecution." *United States v. Hooton*, 662 F.2d 628, 634 (9th Cir. 1981). However, "the link of vindictiveness cannot be inferred simply because the prosecutor's actions followed the exercise of a right, or because they would not have been taken but for exercise of a defense right." *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1168 (9th Cir. 1982). In other words, "[a] sequence of events is not enough; the likelihood of retaliation is crucial." *Id.* at 1171. There was nothing to suggest that indictments were brought here in retaliation for a civil appeal; in fact, the criminal investigation had begun months before the plea offer was broached or the civil appeal decided. Under any applicable standard of review, there was no error in denying discovery for a claim of vindictive prosecution.

6. Entrapment Instruction

Appellants contend that the district court erred by denying an entrapment instruction because some false statements were made in response to a request for information by government officials after the decision had already been made to cancel the relevant procurement.

The standard of review for the court's decision not to provide the jury with a requested entrapment instruction is unsettled. *See United States v. Becerra*, 992 F.2d 960, 963 (9th Cir. 1993). We need not address whether de novo or abuse of discretion review is required here, however, because under either standard the court's denial of an entrapment instruction was not error. "A defendant is entitled to an entrapment instruction if he or she can present some evidence that (1) a government agent induced him or her to commit an illegal act that (2) he or she was not predisposed to commit." *United States v. Sotelo-Murillo*, 887 F.2d 176, 179 (9th Cir. 1989). Because the defendants presented no evidence to raise an issue of fact regarding inducement to commit an *illegal* act, and the relevant evidence actually suggests predisposition, an entrapment instruction was properly denied. *Cf. United States v. Marbella*, 73 F.3d 1508, 1512-13 (9th Cir. 1996) (finding entrapment instruction unwarranted where "there is no evidence the agents suggested to [defendants] that they should submit the fraudulent medical bills to the insurers" and "agents did not pressure [them] and did not attempt to persuade them to engage in the fraudulent activity.").

For the foregoing reasons, the convictions of Sameena Ali and Mirza Ali on the conspiracy count and on the individual counts of making false statements to a government agency are affirmed. In appeal No. 00-10217, however, we vacate Mirza Ali's sentence and remand for resentencing. Mirza Ali was sentenced in a single, "consolidated" sentencing judgment in this case and in the companion case, No. 00-10216, in which we have reversed his conviction. Because his aggregate sentence was a

"package," *United States v. Handa*, 122 F.3d 690, 691-92 (9th Cir. 1997), we remand for resentencing on the counts of conviction in this case.

Convictions **AFFIRMED**. Sentence in No. 00-10217 **VACATED and REMANDED** for resentencing.

UNITED STATES DISTRICT COURT
Northern District of California

UNITED STATES
OF AMERICA

v.

Case Number
CR 99-40002-02 CW

SAMEENA R. ALI,
aka: Sameena Ikbal

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offense(s) Committed On or After November 1, 1987)

(Filed March 28, 2000)

The defendant, SAMEENA R. ALI, was represented by Christopher J. Cannon.

The defendant was found guilty on counts 1, 2, 4, 5, 7, and 11 of the Indictment after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following counts, involving the indicated offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. § 371	Conspiracy	1
18 U.S.C. § 1001	Making False Statements to a Government Agency	2, 4, 5, 7, and 11

As pronounced on March 20, 2000, the defendant is sentenced as provided in pages 2 through 4 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $600.00 for counts 1, 2, 4, 5, 7, and 11, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 28th day of March, 2000.

/s/ Claudia Wilken
CLAUDIA WILKEN
United States
District Judge

Defendant's SSAN: 302-72-2115
Defendant's Date of Birth: 01/29/54
Defendant's address: 45030 Cougar Circle, Fremont, CA 94539
U.S. Marshal No.: 98433-011

PROBATION

The defendant is hereby placed on probation for a term of 60 months on each count to run concurrent.

While on probation you shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. Revocation of probation is mandatory for possession of a controlled substance.

You shall pay the assessment imposed in accordance with 18 U.S.C. Section 3013, and shall immediately notify the probation officer of any change in your economic circumstances that might affect your ability to pay a

special assessment, fine, restitution, or co-payments ordered by the Court.

If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that you pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the judgment. In any case, the defendant shall cooperate with the probation officer in meeting any financial obligations.

Revocation of probation is mandatory for refusal to comply with drug testing imposed as a condition of supervision. 18 U.S.C. Sections 3565(b)(3) and 3583(g)(3)

STANDARD CONDITIONS OF PROBATION

It is the order of the Court that you shall comply with the following standard conditions:

1) You shall not leave the judicial district or other specified geographical area without the permission of the court or probation officer;

2) You shall report to the probation officer as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month;

3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) You shall support your dependents and meet other family responsibilities, including but not limited to, compliance with the terms of any court order or administrative process pursuant to the laws of a state, the District of Columbia, or any other possession or territory of the United States, requiring payment by you for the support and maintenance of any child or of a child and the parent with whom the child is living;

5) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) You shall notify the probation officer ten (10) days prior to any change in residence or employment;

7) You shall consume no alcohol if sentenced to the special condition that you are to participate in a drug/alcohol program;

8) You shall refrain from excessive use of alcohol and shall not purchase possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

9) You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) You shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) You shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

13) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) You shall notify third parties of risks related to your criminal record, personal history, or characteristics, and shall permit the probation officer to make such notifications and/or confirm your compliance with this notification requirement.

SPECIAL CONDITIONS OF PROBATION

While the defendant is on probation pursuant to this Judgment:

1) The defendant shall pay the special assessment that is imposed by this judgment.

2) The defendant shall be prohibited from engaging in self-employment without the prior permission of the probation officer.

3) The defendant shall not hold a position of fiduciary capacity without the prior permission of the probation officer.

4) The defendant is prohibited from being involved in the contracting business without the prior permission of the probation officer.

5) The defendant shall perform 500 hours of community service at the direction of the probation officer.

6) The defendant shall provide the probation officer access to any requested financial information.

7) The defendant shall provide her true name, Sameena Iqbal, and date of birth at all times.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	8
Criminal History Category:	1
Imprisonment Range:	0 months to 6 months
Supervised Release Range:	2 to 3 years
Fine Range:	$1,000 to $10,000
Restitution:	$ none

The court declines to impose a fine in light of the amount of restitution to be imposed against her husband/co-defendant.

The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

UNITED STATES DISTRICT COURT
Northern District of California

UNITED STATES
OF AMERICA

v.

MIRZA ALI, aka Zulfiqar Eqbal, aka Henry Stone,
Defendant.

Case Numbers
CR 98-40159-01 CW
CR 99-40002-01 CW

JUDGMENT IN A CRIMINAL CASE
(For Offense(s) Committed On or After November 1, 1987)

(Filed April 28, 2000)

The defendant, MIRZA ALI, was represented by Christopher J. Cannon.

The defendant has been found not guilty on counts 2, 6, and 9 of the Indictment filed in CR-99-40002 CW, and is discharged as to such counts.

The defendant was found guilty on counts 1 and 2 of the Superseding Indictment filed in CR-98-40159 CW and guilty on counts 1, 3, 8, and 10 of the Indictment filed in CR-99-40002 CW after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following counts, involving the indicated offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. § 1344(1)	Bank Fraud	1 (CR-98-41059 CW)

18 U.S.C. § 1014	Making False Statements to Obtain Bank Loan	2 (CR-98-40159 CW)
18 U.S.C. § 371	Conspiracy	1 (CR-99-40002 CW)
18 U.S.C. § 1001	Making False Statements to an Agency of the United States	3, 8, 10 (CR-99-40002 CW)

As pronounced on April 24, 2000, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $600.00 for counts 1 and 2 in CR-98-40159 CW and counts 1, 3, 8, and 10 in CR-99-40002 CW, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 28th day of April, 2000.

/s/ Claudia Wilken
CLAUDIA WILKEN
United States
District Judge

Defendant's SSAN: 611-78-9260
Defendant's Date of Birth: 10/19/47
Defendant's address: 45030 Cougar Circle, Fremont, CA 94539
U.S. Marshal No.: 98962-011

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of THIRTY (30) months on counts 1 and 2 in CR-98-40159 CW and counts 1, 3, 8 and 10 in CR-99-40002 CW. The terms of imprisonment shall run concurrent on all counts.

The surrender of defendant is stayed pending his appeal to the 9th Circuit Court of Appeals. The defendant is released on his own recognizance under the previous terms and conditions of pretrial release pending the defendant's appeal. The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons within 10 days after issuance of the mandate by the Court of Appeals.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 48 months on counts 1 and 2 in CR-98-40159 CW, and 36 months on counts 1, 3, 8 and 10 in CR-99-40002 CW. The terms of supervised release shall run concurrent to each other.

While on Supervised Release you shall not commit another federal, state or local crime and shall not illegally possess a controlled substance. Revocation of supervised release is mandatory for possession of a controlled substance.

You shall pay the assessment imposed in accordance with 18 U.S.C. Section 3013, and shall immediately notify the probation officer of any change in your economic circumstances that might affect your ability to pay a special assessment, fine, restitution, or co-payments ordered by the Court.

If the judgment imposed a fine or a restitution obligation, it shall be a condition of supervision that you pay any such fine or restitution that remains unpaid at the commencement of the term of supervision in accordance with any Schedule of Payments set forth in the Criminal Monetary Penalties sheet of the judgment.

In any case, the defendant shall cooperate with the probation officer in meeting any financial obligations.

Revocation of supervised release is mandatory for refusal to comply with drug testing imposed as a condition of supervision. 18 U.S.C. Sections 3565(b)(3) and 3583(g)(3)

STANDARD CONDITIONS OF SUPERVISED RELEASE

It is the order of the Court that you shall comply with the following standard conditions:

1) You shall not leave the judicial district or other specified geographical area without permission of the court or probation officer;

2) You shall report to the probation officer as directed by the Court or the probation officer, and shall submit a truthful and complete written report within the first five days of each month;

3) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) You shall support your dependents and meet other family responsibilities, including but not limited to, compliance with the terms of any court order or administrative process pursuant to the laws of a state, the District of Columbia, or any other possession or territory of the United States, requiring payments by you for the support and maintenance of any child or of a child and the parent with whom the child is living;

5) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) You shall notify the probation officer ten (10) days prior to any change in residence or employment;

7) You shall consume no alcohol if sentenced to the special condition that you are to participate in a drug/alcohol program;

8) You shall refrain from excessive use of alcohol and shall not purchase possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician;

9) You shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10) You shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) You shall permit a probation officer to visit you at any time at home or elsewhere, and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) You shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

13) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of court;

14) You shall notify third parties of risks related to your criminal record, personal history, or characteristics, and shall permit the probation officer to make such notifications and/or confirm your compliance with this notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall pay any restitution and special assessment that is imposed by this judgment and that remains unpaid at the commencement of the term of supervised release as directed by the probation officer.

2) The defendant is prohibited from engaging in self-employment, including acting as a consultant to a family owned business.

3) The defendant shall not maintain a position of fiduciary capacity without the prior permission of the probation officer.

4) The defendant is prohibited from being involved in the contracting business.

5) The defendant shall provide the probation officer access to any requested financial information.

6) The defendant shall not possess any false identification and shall provide his true name of Zulfiqar Eqgal and date of birth of 10/19/47 at all times.

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following is a victim of defendant's criminal conduct and has sustained loss in the indicated amount and orders restitution by the defendant as follows:

Name & address of payee(s)	**Amount**
Cupertino National Bank, 2860 West Bayshore Road, Palo Alto, CA 94303 (Attn: Patrick Pierce, Vice President, Special Assets)	$602,268.20

Payments of restitution are to be made to Clerk, U. S. District Court, for transfer to the payee.

Restitution is due and payable immediately and may be collected in accordance with the Bureau of Prisons Inmate Financial Responsibility Program. Any balance that remains unpaid at the commencement of supervised release shall be paid as directed by the probation officer.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report as stated on the record in court. The court finds the Offense Level,

Criminal History Category, and Guideline Range as found by the Probation Officer and sentences the defendant to the low end of the Guideline Range of 30 months custody of the Bureau of Prisons.

Guideline Range Determined by the Court:

Total Offense Level:	19
Criminal History Category:	1
Imprisonment Range:	30 months to 37 months
Supervised Release Range:	3 to 5 years (CR-98-40159 CW)
	2 to 3 years (CR-99-40002 CW)
Fine Range:	$6,000 to $1,000,000
Restitution:	$602,268.20

The court declines to impose a fine because payment of a fine would interfere with the defendant's ability to pay restitution.

United States Court of Appeals,
Ninth Circuit.

SAMEENA INC., an Oregon corporation dba Samtech Research; Sameena Ali; Mirza Ali, Plaintiffs-Appellants,

v.

UNITED STATES AIR FORCE; V. Carol Moore; Steve Bangs; Alan Schoenberg; Maxwell Air Force Base; Pilson; Mike Thomason, Defendants-Appellees.

No. 97-15252.

Argued and Submitted Feb. 10, 1998.
Decided July 6, 1998.

J. Christopher Hall, Oakland, CA, *Joseph P. Russoniello, Ann M. Mooney*, Cooley Godward LLP, San Francisco, CA, for plaintiffs-appellants.

John N. Hemann, Assistant United States Attorney, San Francisco, CA, for defendants-appellees.

Appeal from the United States District Court for the Northern District of California; Fern M. Smith, District Judge, Presiding. D.C. No. CV-96-01889-FMS.

Before: *D.W. NELSON, BOOCHEVER*, and *REINHARDT*, Circuit Judges.

D.W. NELSON, Circuit Judge:

This case arises from a contractor's alleged attempts to defraud the government and the government's efforts to bar the contractor from bidding on future government projects. The appellants bring civil rights and common-law tort claims against a number of individual employees of the United States Air Force (the "Air Force") and argue

that the Air Force's decision to debar them for a period of fifteen years was arbitrary and capricious, in violation of the Administrative Procedure Act ("APA"), codified in pertinent part at 5 U.S.C. § 704. The district court dismissed the claims against the individual defendants and granted summary judgment in favor of the Air Force on the APA claims. We have jurisdiction pursuant to 28 U.S.C. § 1291. Although we affirm the dismissal of the claims against the individual defendants, we reverse the district court's summary judgment because we conclude that the Department of the Air Force (the "Air Force") violated the appellants' constitutional right to due process when it denied them an evidentiary hearing, as required by 48 C.F.R. § 9.406-3(b)(2).

FACTUAL AND PROCEDURAL BACKGROUND

In February 1992, the Social Security Administration ("SSA") solicited bids from computer suppliers for a quantity of microcomputer workstations. University Systems, Inc. ("USI"), a California-based corporation of which Appellant Mirza Ali was Chief Executive Officer, submitted a proposal to the SSA in April 1992. USI's bid was deemed competitive, and USI provided the SSA with samples of its products for further evaluation.

During this process, questions arose regarding whether a mouse device included in the proposal was manufactured in compliance with the Trade Agreements Act of 1979, 19 U.S.C. §§ 2501-2582. While this matter was being investigated, it was discovered that two USI officers had submitted a fraudulent letter to the SSA. The

SSA consequently eliminated USI from consideration for the workstation contract.

Subsequently, the United States Department of Health and Human Services ("HHS"), of which the SSA is part, commenced "debarment" proceedings against USI and four of its officers, including Mirza Ali, seeking to disqualify them from submitting government contract proposals for three years. On February 2, 1994, USI, Mirza Ali, and the other USI officers were debarred from government contracting through February 18, 1996.

Mirza Ali's wife, Appellant Sameena Ali, is president and sole director of Appellant Sameena Inc. ("Sameena"), which was incorporated in February 1993 by Keith Griffen, a USI officer. Each of the appellants uses aliases: Sameena Ali sometimes goes by "Sameena Ikbal." Mirza Ali sometimes goes by "Zulfiqar Eqbal." Sameena Inc. operates under the assumed name "Samtech Research, Inc." ("Samtech").

Like USI, Samtech supplied computer workstations to government agencies. In June 1995, an Alabama-based contracting squadron of the Air Force issued a contract solicitation for laptop computers. An amendment to the solicitation indicated that the buyer was V. Carol Moore.

Samtech submitted a proposal to Moore in July 1995. Included in Samtech's proposal was a certification that neither Samtech nor any of its principals was debarred or proposed for debarment at that time. The certification defined "principals" as "officers; directors; owners; partners; and persons having primary management or supervisory responsibilities within a business entity." Because the Air Force solicitation required that bidders have at

least three years of experience as a government contractor, Samtech's proposal also included a list of "Government Contract Awards." Among them was a contract with the United States Department of Energy (the "DoE contract") that Sameena had obtained in 1994 through a novation from USI.

In response to a query, Samtech sent Moore a letter in September 1995 explaining that Samtech "started doing business with the Federal Government by acquiring a contract for the supply of ADP equipment to the United States Department of Energy in 1992." On further investigation, Moore discovered that the contract actually had been awarded to USI in 1992 and had only been novated to Samtech in 1994. Moore also obtained bank documents indicating that "Sameena Ikbal" and "Zulfiqar Eqbal" were authorized to make withdrawals from Samtech's accounts and were, respectively, "President/Secretary" and "Vice President" of the corporation. This information appeared to Moore to contradict the statements made in Samtech's contract proposal.

On the basis of these apparent misrepresentations, Samtech was deemed ineligible for the Air Force contract. Moreover, in December 1995, the Air Force Contracting Officer, Gladys McBride, submitted a recommendation that Samtech be debarred. McBride appended the entire administrative file to her recommendation, including an affidavit by Moore describing her investigations.

On December 26, 1995, Sameena Inc., Samtech, Sameena Ali, and Mirza Ali ("the appellants") were notified that they had been proposed for debarment (and, in Mirza Ali's case, an "extension" of debarment). The

notices were accompanied by memoranda setting forth the grounds for the proposed debarments. The notices also invited the appellants to submit information and argument in opposition to the debarment.

The appellants included in their response a letter dated February 21, 1996, from an official at Samtech's bank. The letter stated that the document indicating that Zulfiqar Eqbal was Vice President of Samtech – a bank signature card – had been "corrected" after the bank was informed "that Eqbal was not a corporate officer" of Sameena or Samtech. The submission also included copies of checks written on Sameena's bank accounts. A number of these checks were signed by "Zulfiqar Eqbal" and were made out to a variety of payees, including physicians, a sports club, and Eqbal (Mirza Ali) himself. The appellants' submission also requested an evidentiary hearing on the issue of Mirza Ali's role at Samtech. Notwithstanding the submission, and without an evidentiary hearing, the Air Force issued a final decision in June 1996 to debar Sameena/Samtech and Sameena Ali – and to extend Mirza Ali's debarment – until December 2010. The debarment was based on findings that the appellants had (1) made false statements regarding Samtech's experience as a contractor, (2) provided false certifications that none of Samtech's principals was debarred, and (3) participated in a scheme to avoid the effects of USI's debarment.

On August 30, 1996, the appellants filed two complaints in the United States District Court for the Northern District of California. The first complaint, brought by Mirza Ali against HHS and against six agency employees in their individual capacities, focused on Ali's initial debarment and sought declaratory relief and damages.

The second complaint, brought by Mirza Ali, Sameena Ali, and Sameena/Samtech against the Air Force and seven Air Force employees in their individual capacities, focused both on the debarment of Sameena/Samtech and Sameena Ali and on the extension of Mirza Ali's debarment.

This second complaint made substantially the same allegations as the first, even though it was directed at entirely different defendants. The appellants alleged (1) that the individual Air Force officials had conspired to violate their civil rights and had committed several common-law torts and (2) that the Air Force's decision to debar them was arbitrary and capricious and should be set aside pursuant to the APA.

In an order filed December 11, 1996, the district court dismissed the claims against the individual defendants for lack of personal jurisdiction and, alternatively, on the grounds that the appellants had failed either to plead conspiracy with sufficient particularity or to comply with the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The court also granted summary judgment to the Air Force on the APA claims. The appellants timely appeal. We affirm the district court's dismissal of the claims against the individual defendants but reverse the summary judgment in favor of the Air Force.

STANDARD OF REVIEW

A dismissal with leave to amend is reviewed de novo. *Dumas v. Kipp*, 90 F.3d 386, 389 (9th Cir.1996). A grant of summary judgment is also reviewed de novo. *Covey v. Hollydale Mobilehome Estates*, 116 F.3d 830, 834

(9th Cir.1997). The standards governing review of the district court's individual determinations are addressed below.

ANALYSIS

I. The district court properly determined that the appellants failed adequately to plead conspiracy.

The district court determined that the appellants failed to "allege conspiracy with sufficient particularity." We agree. The appellants failed to allege facts to support their allegations that the individual defendants agreed illegally to debar them or that they agreed to discriminate against them because of their race. Accordingly, we affirm the district court's dismissal of the conspiracy count. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 627 (9th Cir.1988).[1]

II. The district court properly dismissed the tort claims against the individual defendants.

The district court dismissed the appellants' common law tort claims against the individual defendants on the

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[1] Because we affirm the district court's dismissal of the conspiracy claims against the individual defendants, we need not decide whether the district court had personal jurisdiction over the individual defendants. *See Lee v. Beaumont*, 12 F.3d 933, 937 (9th Cir.1993) ("A court may assume the existence of personal jurisdiction and adjudicate the merits in favor of the defendant without making a definitive ruling on jurisdiction."). We also need not reach the appellants' claim that the district court erred in staying discovery regarding the personal jurisdiction issue.

ground that the appellants had failed to comply with the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680. The district court did not err in this determination.

Pursuant to 28 U.S.C. § 2679(d), the United States was properly substituted for the individual defendants. United States Attorney Michael Yamaguchi certified that the federal employees named in the complaint were acting within the scope of their employment, *see* 28 U.S.C. § 2679(d)(1); 28 C.F.R. § 15.3, and the complaints did not present any evidence to the contrary. The appellants do not contest that the defendants' jobs required them to assess the integrity of government contractors and to recommend and effect debarment where appropriate. Thus, even if the defendants' debarment decisions were based upon improper motives, the debarment was plainly within the scope of the defendants' employment. *See Wilson v. Drake*, 87 F.3d 1073, 1076 (9th Cir.1996).

Given the United States' substitution, the appellants were required to present their tort claims to the appropriate federal agency before raising them in court. *See* 28 U.S.C. § 2675. There is no evidence in the administrative record that the appellants filed their tort claims with the Air Force. Accordingly, the district court correctly concluded that it lacked subject matter jurisdiction over the claims. *See Meridian Int'l Logistics Inc. v. United States*, 939 F.2d 740, 743 (9th Cir.1991).

III. The district court erred in granting the Air Force's motion for summary judgment.

The appellants argue that the decision to debar them was arbitrary and capricious. They appeal the district court's summary judgment in favor of the Air Force on three grounds: First, they argue that Carol Moore's declaration failed to establish that she had personal knowledge regarding the contract proposal at issue and should have been stricken from the administrative record. Second, they claim that, by the terms of the 1994 novation of the DoE contract, USI's previous two years of government contracting experience should have been "imputed" to Samtech. Finally, they contend that they had a due process right to an evidentiary hearing regarding Mirza Ali's role at Samtech. We address each of the appellants' claims in turn.

A. The district court properly rejected the appellants' request to strike Carol Moore's affidavit.

The appellants claim that the Moore affidavit should not have been admitted as evidence in the administrative proceedings against them. They point out that the affidavit does not indicate to which specific contract proposal it refers. On that basis, they argue that Moore failed to establish her personal knowledge of the facts contained in the affidavit and that the affidavit consequently was incompetent.

As the district court recognized, the appellants' position is wholly without merit. The affidavit contains information that clearly links it to the events in question. It

refers in detail to Samtech's proposal (the appellants do not allege that they submitted more than one proposal to the Air Force), the debarment of USI and Mirza Ali, and Moore's personal investigations of the matter. Moreover, the facts in the affidavit comport with the administrative record, which includes documentation indicating that Moore was the contract specialist assigned to the proposal in question. Since the appellants do not allege any facts that call the reliability of the affidavit into question, we agree with the district court that its use as evidence in the administrative proceedings against the appellants was neither arbitrary nor capricious.

B. The 1994 novation did not "impute" to appellants USI's government contracting experience.

On February 13, 1994, following USI's debarment, USI, Sameena, and the DoE entered into a Novation Agreement, transferring USI's rights and obligations to Sameena. The agreement states, in pertinent part:

> The government recognizes the Transferee [Sameena] as the Transferor's [USI's] successor in interest in and to the contract. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contract as if the Transferee were the original party to the contract.

The appellants claim that the terms of this Agreement led them "reasonably" to believe that, because they would be treated as the "original party" to the contract, the Novation "imputed the DoE contract experience entirely to Samtech." As the district court noted, however, this claim is directly belied by the appellants' earlier

representations in their submission in response to the proposed debarment, in which they contended that their overstatement of government contracting experience had resulted from an "innocent" error about the date of the contract. In light of this inconsistency, the Air Force did not act arbitrarily or capriciously in refusing to attach any credibility to this claim.

C. *The appellants were entitled to an evidentiary hearing.*

The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates. *See Vitarelli v. Seaton*, 359 U.S. 535, 545, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); *Service v. Dulles*, 354 U.S. 363, 372, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260, 267, 74 S.Ct. 499, 98 L.Ed. 681 (1954). An agency's failure to follow its own regulations "tends to cause unjust discrimination and deny adequate notice" and consequently may result in a violation of an individual's constitutional right to due process. *NLRB v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir.1971); *see also United States v. Newell*, 578 F.2d 827, 834 (9th Cir.1978). Where a prescribed procedure is intended to protect the interests of a party before the agency, "even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed." *Vitarelli*, 359 U.S. at 547, 79 S.Ct. 968 (Frankfurter, J., concurring); *see also* Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L.Rev. 629, 630 (1974) (observing that agency violations of regulations promulgated to

provide parties with procedural safeguards generally have been invalidated by courts).

The Federal Acquisition Regulation ("FAR") establishes a system of uniform policies and procedures governing acquisitions by all executive agencies. *See* 48 C.F.R. § 1.101. In recognition of the "serious nature of debarment," *see* 48 C.F.R. § 9.402, the FAR sets out detailed procedures to ensure that this sanction, which is intended to safeguard the integrity of the acquisitions process, itself is applied in conformity with "principles of fundamental fairness." 48 C.F.R. § 9.406-3(b). Accordingly, the FAR provides:

> [I]f it is found that the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, agencies shall also – (i) Afford the contractor an opportunity to appear with counsel, submit documentary evidence, and confront any person the agency presents.

48 C.F.R. § 9.406-3(b)(2). Thus, in the event of a genuine factual dispute, the FAR clearly establishes that a contractor facing debarment is entitled to an evidentiary hearing.

The appellants claim that they raised a genuine issue of material fact with regard to Mirza Ali's position at Sameena/Samtech. They contend that Ali was mistakenly listed as Vice President of the company on the bank signature card discovered by Moore and that the February 1996 letter from the bank supports that contention. Accordingly, they claim that they were entitled under the FAR to an evidentiary hearing on the matter.

The district court rejected the appellants' claims on two grounds. First, the court found the letter from the bank to be inconclusive. The court pointed out that the letter merely acknowledged that the bank had issued a new signature card deleting Eqbal's name, and that it had made this "correction" after being informed that Zulfiqar Eqbal was not a corporate officer. The district court suggested that the letter had little probative value because it was sent after debarment proceedings against the appellants already had commenced.

Second, the district court observed that the operative factual question informing the debarment decision was not whether Ali/Eqbal was Vice President of Sameena/Samtech but, rather, whether he exercised control over the business. As the court noted, the Debarring Official found that Ali had written business-related and personal checks on Samtech's account and had stated on the telephone that he was project manager for government solicitations. Based on that evidence, the Debarring Official concluded, "[I]t is clear that Mr. Eqbal had full authority to expend Samtech's resources and bind the company." Because the district court found that "[n]othing plaintiffs submitted created a dispute as to this issue," it concluded that they were not entitled to an evidentiary hearing.

The district court failed, however, to acknowledge evidence submitted by the appellants that calls into question whether Ali/Eqbal was a principal of Sameena/Samtech. The appellants submitted evidence that Ali/Eqbal was Vice President of a Hong Kong corporation also called Samtech and that his position there had likely caused the confusion involving the signature cards. The appellants also submitted evidence indicating that Ali/

Eqbal held no official position with Sameena/Samtech other than bookkeeper and that the writing of checks was consistent with that position. The appellants denied that Ali/Eqbal had represented himself to be a project manager or any other type of corporate officer. They explained that the checks made out to and signed by Eqbal were not for his personal use and were not issued at his discretion. Finally, the appellants challenged the government to produce any document indicating that Ali/Eqbal had actually acted in the capacity of a principal with regard to control over the company's decisionmaking process. Thus, although the appellants' submission does not establish that the Debarring Official acted arbitrarily or capriciously in determining that Ali/Eqbal was a principal of Samtech/Sameena, it does raise a genuine factual dispute regarding the issue.

The appellants requested an evidentiary hearing to address this question. The Debarring Official decided, however, that a hearing was unwarranted, finding the appellants' denials of the charges against them to be "unsupported by credible evidence." We do not doubt that the Air Force is in a better position than this Court to assess the credibility of the evidence offered by the appellants. We are convinced, however, that an evidentiary hearing would have been the appropriate forum in which to make such an assessment, particularly in view of the serious consequences attaching to a debarment of 15 years. The FAR states unambiguously that such a hearing "shall" be afforded if genuine factual disputes arise. Accordingly, we conclude that the Air Force violated the appellants' constitutional right to due process in failing

to comply with binding regulations and that the appellants are entitled to such a hearing on remand. As Justice Frankfurter observed in a similar context, "He that takes the procedural sword shall perish with that sword." *Vitarelli*, 359 U.S. at 547, 79 S.Ct. 968 (Frankfurter, J., concurring).

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of the appellants' claims against the individual defendants. However, we REVERSE the summary judgment in favor of the Air Force and REMAND to the district court with instructions to remand this matter to the Air Force. The Air Force should hold an evidentiary hearing, pursuant to 48 C.F.R. § 9.406-3(b)(2), to address whether Mirza Ali/Zulfiqar Eqbal was a principal of Sameena/Samtech.

AFFIRMED in part, REVERSED in part and REMANDED. Each party shall bear its own costs.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SAMEENA R. ALI, aka Sameena Ikbal, Defendant-Appellant.	No. 00-10165 DC No. CR 99-40002 CW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MIRZA ALI, aka Zulfiqar Eqbal, aka Henry Stone, Defendant-Appellant.	No. 00-10217 DC NO. CR 99-40002 CW **ORDER** (Filed Nov. 20, 2001)

Before: O'SCANNLAIN, TASHIMA, and THOMAS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA, PLAINTIFF, VS. MIRZA Z. ALI, DEFENDANT.	NO. CR 98-40159 CW
UNITED STATES OF AMERICA, PLAINTIFF, VS. MIRZA Z. ALI, and SAMEENA R. ALI, DEFENDANTS.	NO. CR 99-40002 CW VOLUME 8 PAGES 1129-1305 JURY TRIAL

OAKLAND, CALIFORNIA
THURSDAY, SEPTEMBER 23, 1999

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CLAUDIA WILKEN
UNITED STATES DISTRICT COURT JUDGE AND JURY

* * *

INSTRUCTIONS TO THE JURY

[8-1185] AT ISSUE IN THIS CASE IS WHETHER OR NOT DEFENDANT MIRZA ALI, ALSO KNOWN AS ZULFIQAR EQBAL, WAS A PRINCIPAL OF SAMEENA INC. DOING BUSINESS AS SAMTECH RESEARCH AT THE TIME CERTAIN STATEMENTS WERE MADE TO AGENCIES OF THE UNITED STATES GOVERNMENT. THIS IS FOR YOU TO DECIDE.

PRINCIPALS ARE OFFICERS, DIRECTORS, OWNERS, PARTNERS [8-1186] OR PERSONS HAVING PRIMARY MANAGEMENT OR SUPERVISORY RESPONSIBILITY WITHIN A BUSINESS ENTITY, E.G., GENERAL MANAGER, PLANT MANAGER, HEAD OF — HEAD OF A SUBSIDIARY, DIVISION OR BUSINESS SEGMENT, AND SIMILAR POSITIONS.

* * *

CLOSING ARGUMENT/LYONS

[8-1206] WELL, YOU'VE HEARD EXTENSIVE EVIDENCE — AND INCLUDING FROM SAMEENA ALI HERSELF — ABOUT HOW SHE RAN THE WHOLE COMPANY. SHE ADMINISTERED EVERYTHING. SHE WAS THE ONE THAT WAS REALLY IN CHARGE.

* * *

[8-1292] AND, OF COURSE, IT'S OUR ARGUMENT THAT HE — THAT WHAT MR. MIRZA ALI, ALSO KNOWN AS ZULFIQAR EQBAL, ALSO KNOWN AS HENRY STONE, WAS, THAT HE FELL WITHIN THAT DEFINITION OF HAVING PRIMARY SUPERVISORY RESPONSIBILITY, MANAGEMENT RESPONSIBILITY, IN A WAY THAT IS SIMILAR TO — AND HELD A POSITION SIMILAR TO THOSE EXAMPLES GIVEN IN THE DEFINITION. THAT'S FOR YOU TO DECIDE.

* * *